83-1143

No._____



IN THE

# Supreme Court of the United States

October Term, 1983

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

vs.

COUNTY OF ALLEGHENY,

SOLOMON AND TESLOVICH, INC., and
RAM CONSTRUCTION CO., INC.

## PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

HENRY E. REA, JR.
BRANDT, MILNES & REA
*Counsel for Petitioner,*
*Carol M. Captline*
301 McKnight Park Drive
Pittsburgh, Pennsylvania 15237
(412) 367-3330

Batavia Times Publishing Co.
Pittsburgh, Pa. (412) 881-7463

## Question Presented for Review

Whether Allegheny County acquired title to subsurface minerals owned of record by Kirk Industries, Inc., in 1958 and 1959, where Allegheny County instituted condemnation proceedings in 1958 and 1959 which named and notified only Mike Mazzaro, the record owner of the surface estate, although the identity and whereabouts of Kirk Industries, Inc., the record owner of the subsurface estate, were easily ascertainable?

Answered in the affirmative by the Court below.

# TABLE OF CONTENTS.

Page

## TABLE OF AUTHORITIES.

Cases:



Statute:

IN THE

# Supreme Court of the United States

---

October Term, 1983

---

No._____

---

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

vs.

COUNTY OF ALLEGHENY,

SOLOMON AND TESLOVICH, INC., and
RAM CONSTRUCTION CO., INC.

---

## PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

### Opinions Below

The Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, is reported at 130 P.L.J. 165 (1981). The Opinion of the Commonwealth Court of Pennsylvania is reported at _____ CMWLTH. CT. _____ (1983), 459 A.2d 1298 (1983).

## Statement of Jurisdiction

The Decrees of the Commonwealth Court of Pennsylvania were made and entered on May 2, 1983. Thereafter, by Order entered June 23, 1983, the Commonwealth Court of Pennsylvania denied Petitioner's Application for Reargument. On September 20, 1983, the Supreme Court of Pennsylvania denied Petitioner's timely Petition for Allowance of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

## Constitutional Provisions

I

### UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

II

## UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Statement of the Case

These suits arise out of the construction of an extension to Taxiway N-1 at the Greater Pittsburgh International Airport in Findlay Township, Allegheny County, Pennsylvania, during the summer of 1979. On July 13, 1979, Allegheny County awarded a contract to Solomon and Teslovich, Inc., to do all of the excavation work necessary to improve the site for the construction of Taxiway N-1. Thereafter, on July 18, 1979, Solomon and Teslovich, Inc., assigned all of its interest in the contract to Ram Construction Co., Inc.

In the process of the construction of Taxiway N-1 at the Greater Pittsburgh International Airport, Ram Construction Company, Inc., removed and sold tens of thousand of tons of coal owned by the Estate of Mike Mazzaro, Deceased. The claim of title to the subsurface minerals by the estate of Mike Mazzaro, Deceased, is based upon the following facts:

On February 19, 1955, Mike Mazzaro purchased 104.085 acres of land situated in Findlay Township, Allegheny

County, Pennsylvania. The deed to Mike Mazzaro specifically excepted and reserved to the grantor, Cosgrove Coal Company, its successor and assigns, "all the coal, gas, oil, limestone and other minerals underlying said tract of land."

Thereafter, by Certificate of Amendment of the Articles of Incorporation, dated March 1, 1955, and filed with the Department of State of the Commonwealth of Pennsylvania, the name of Cosgrove Coal Company was changed to Kirk Industries, Inc.

On March 4, 1958, and May 5, 1959, the Allegheny County Commissioners adopted resolutions authorizing the condemnation, in fee simple, of the entire 104.085 acre tract owned by Mike Mazzaro in Findlay Township, Allegheny County, Pennsylvania. The purpose of the condemnation was to establish and maintain air navigation and terminal facilities for what has come to be known as the Greater Pittsburgh International Airport.

In the condemnation proceedings which followed in the Court of Common Pleas of Allegheny County, Pennsylvania, Cosgrove Coal Company and its successor, Kirk Industries, Inc., were not named as record parties to the proceedings. Neither Cosgrove Coal Company nor its successor, Kirk Industries, Inc., were ever given actual notice of the pendency of the condemnation proceedings in Allegheny County. Allegheny County relied exclusively upon notice by publication.

On October 19, 1961, the Report of Viewers was filed, Awarding Mike Mazzaro $71,980 as compensation for the taking of his interest in the 104.085 acre tract. Cosgrove Coal Company and its successor, Kirk Industries, Inc., having never received notice, were not

present at the Viewers' Hearing and were awarded nothing for their interest in the subsurface minerals.

On September 20, 1965, years after the Viewers' Award, Mike Mazzaro purchased the subsurface minerals underlying eight parcels of property in Findlay Township, Allegheny County, Pennsylvania, from Kirk Industries, Inc. The conveyance was for valuable consideration and included the 104.085 acre tract previously condemned by Allegheny County.

As a result of the construction in 1979, and the resulting conversion of the subsurface minerals, Petitioners, Carol M. Captline and Equibank N.A., Co-Executors of the Estate of Mike Mazzaro, Deceased, instituted two actions in the Court of Common Pleas of Allegheny County, Pennsylvania.

The first action was brought against Allegheny County pursuant to the Eminent Domain Code of 1964. The Petition for Appointment of Viewers in this action alleged an inverse condemnation of coal and other minerals underlying the 104.085 acre tract located in Findlay Township. The Petition sought compensation for the taking of real property by Allegheny County, a body politic, clothed with the power of eminent domain.

A second action was brought against the contractors, Solomon and Teslovich, Inc. and Ram Construction Co., Inc. This action was brought in trespass for the alleged tortious conversation of the subsurface minerals owned by the Mazzaro Estate. This second action sought an accounting of the coal removed by defendants from the 104.085 acre tract and requested damages for the conversion.

Allegheny County filed Preliminary Objections and New Matter to the Petition for Appointment of Viewers.

The Preliminary Objections and New Matter denied the allegations of the Petition for Appointment of Viewers and, *inter alia*, averred that Allegheny County acquired title to the subsurface minerals by virtue of the 1958 and 1959 condemnation proceedings.

Similarly, Solomon and Teslovich, Inc. and Ram Construction Co., Inc. filed Preliminary Objections to the Complaint in Trespass setting forth, *inter alia*, the same defense as Allegheny County.

Plaintiff's Answer to these pleadings in both actions raised the issue of the constitutionality of any purported condemnation of the subsurface estate by virtue of the 1958 and 1959 condemnation proceedings. Thereafter, the matters were consolidated before the Trial Court and by Opinion of the Honorable Judge Silvestri dated October 30, 1981, the Court of Common Pleas of Allegheny County, Pennsylvania, determined that Allegheny County constitutionally acquired the entire interest in the 104.085 acre tract condemned, including the underlying mineral rights, although the only form of notice was by publication and posting containing only the name of the owner of the surface estate, Mike Mazzaro.

Timely appeals were taken from the Orders of Judge Silvestri to the Commonwealth and Superior Courts of Pennsylvania. Thereafter, the matters were consolidated for disposition in the Commonwealth Court. The questions raised in the Commonwealth Court were set forth as follows:

> 1. Whether the condemning authority acquired title to the subsurface minerals which had been validly severed from the surface estate and separately owned prior to the condemnation of the surface estate where the owner of the subsurface

minerals was never made a party to or notified of the condemnation proceedings?

Answered in the affirmative by the Court below.

2. Whether the Viewers' Award included compensation for the subsurface minerals which had been validly severed from the surface estate and separately owned prior to condemnation of the surface estate where the owner of the subsurface minerals was never made a party to or notified of the condemnation proceedings and never introduced evidence concerning the value of the subsurface minerals?

Answered in the affirmative by the Court below.

Thereafter, by Opinion of the Honorable Judge McPhail of the Commonwealth Court dated May 2, 1983, the court concluded that Allegheny County effectively condemned the subsurface estate by virtue of the 1958 and 1959 condemnation proceedings regardless of whether the notice afforded Cosgrove Coal Company or its successor, Kirk Industries, Inc., satisfied the requirements of due process as set forth in the Constitutions of the Commonwealth of Pennsylvania and the United States of America.

**Argument.**

The Commonwealth Court of Pennsylvania held that regardless of any defects in the condemnation procedure utilized in 1958 and 1959, Allegheny County acquired title to the coal underlying the 104.085 acre parcel because it was the County's intention to do so. This holding conflicts directly with the constitutional mandate for due process as set forth in the Decisions of this Court.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Central Hanover Bank and Trust Company established a common trust fund pursuant to a New York statute. A total of approximately 113 trusts participated in the common fund. The exact number of beneficiaries and their addresses was not made a part of the record in the New York Court.

After administration of the common fund the Bank petitioned a New York Court for settlement of its first account. Pursuant to New York law, the only notice given the beneficiaries was by publication in a local newspaper and listed only the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds.

At the time of the filing of the petition for settlement, the trial court appointed Mullane as attorney for all parties not appearing and who may have an interest in the trust fund. In this capacity, Mullane filed objections questioning the constitutional validity of the notice afforded beneficiaries.

Addressing the Constitutional requirements of the due process clause of the Fourteenth Amendment, this court said:

> "Many controversies have raged about the cryptic and abstract words of the due process clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313, 70 S.Ct. at 656 and 657.

In order to determine whether the notice and opportunity for hearing afforded the beneficiaries of the common trust fund satisfied the constitutional requirements of the due process clause, the Court balanced the interests of the State against the individual interests of the beneficiaries. In this endeavor, the Court recognized the interests of the state in bringing issues as to fiduciaries to final settlement and said that they must be balanced against the individual's interest in an opportunity to be heard which is protected by the Fourteenth Amendment. In this regard, the Court stated that the right to be heard has little value unless the individual is informed that the matter is pending.

The Supreme Court in *Mullane, supra*, reiterated the established principles of due process as set forth in earlier decisions of that court. The Court said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 . . . The notice must be of such a notice as reasonably to convey the required information *Grannis v. Ordeau*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed 1363, and it must afford a reasonable time for these interested to make their appearance, *Roller v. Holly*, 176 U.S. 398, 20 S. Ct. 410, 44 L. Ed 520, and of *Goodrich v. Ferris*, 214 U.S. 71, 29 S. Ct. 580, 53 L. Ed 914." 339 U.S. at 314.

As with the case at bar, the appellee Bank in *Mullane* relied upon statutory requirement of notice by publication to inform interested parties. In this regard the Court in *Mullane* remarked that it would be idle to pretend that such publication is reliable to so inform interested parties. The Court took notice of the fact that the majority of such cases before the U. S. Supreme Court involved process constructively served through local newspapers. On this basis the Court held that notice by publication was sufficient for beneficiaries whose interests or whereabouts could not be ascertained with *due diligence*. However, with respect to the remaining beneficiaries the Court said:

> "The statutory notice to known beneficiaries is inadequate, not because, in fact, it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." 339 U.S. at 319.

It is important to note that the condemnation proceedings at issue were brought under the provisions of the Second Class County Code. The record discloses that the *only* notice afforded interested parties was by legal advertisements duly published (R. C. D. 48a). Despite this fact, the Commonwealth Court concludes that there was compliance with the statutory provisions for notice. The Commonwealth Court concluded, however, that the record facts do not disclose whether Allegheny County took reasonable steps to provide actual notice.

This holding of the Commonwealth Court clearly conflicts with *Mullane v. Central Hanover Bank & Trust Co.* In *Mullane*, the Bank relied exclusively upon the statutory requirements and the record did *not* reflect the

addresses of any beneficiaries or any attempts to ascertain any addresses. Nevertheless, the Court found the notice employed to be unconstitutional.

In the case at bar, the record reflects that Allegheny County did not satisfy the requirements of Article XXVI of the Second Class County Code. The record also reflects that Kirk Industries, Inc., the record owner of the coal, was a property owner in Allegheny County and a registered Pennsylvania corporation whose Articles of Incorporation were amended as recently as March 1, 1955. Therefore, it is clear that the requirements of due process were not afforded Kirk Industries because no attempt was made to notify it of the pendency of the proceedings.

The 1958 and 1959 condemnation resolutions were adopted pursuant to the provisions of the Second Class County Code. Article XXIV of the Code vests Allegheny County with the power of Eminent Domain for the purpose of establishing and maintaining air navigation and terminal facilities.

In regard to the procedure for the condemnation of lands under Article XXIV, Section 2403 provides:

> "The proceedings for the condemnation of lands under the provisions of this article and for the assessment of damages for property taken, injured or destroyed shall be conducted in the same manner as provided under Article XXVI."

Article XXVI of the Second Class County Code sets forth the manner in which condemnation proceedings are to be conducted. Section 2604 grants the right to damages to all owners of land, property or material appropriated, injured or destroyed. Section 2608 provides, further, the right to petition the Court for the appointment of viewers to fix the amount of damage.

In regard to notice, Section 2604 provides:

> "Notice of the time and place of said meeting shall be given in the manner provided by law for the service of summons in a personal action upon all parties allowed damages and against whom benefits have been assessed, as shown by said schedule, if the said parties can be found in the county, or upon an adult person, if any, residing upon the property affected in case the owner or reputed owner cannot be found, and to all others by publication in the newspaper or newspapers in which the first notices of said view were published. When no service is made upon the owner, reputed owner or upon an adult person residing upon the property affected, said notice, where publication thereof has also been made, shall be deemed to have been properly served if tacked or conspicuously posted on the premises. The court may provide by whom the notice provided by this act shall be posted, given and served, and fix the compensation for said service."

The condemnation resolutions adopted by Allegheny County describe the condemned parcel as containing 88.1 and 15.536 acres and both situate in Findlay Township and owned by Mike Mazzaro. Neither condemnation resolution named Kirk Industries as the owner of the coal underlying the condemned parcel although the public records disclose that Kirk Industries owned the coal continuously from the time the condemnation resolutions were adopted until after the Viewers' award was made.

At no time during the condemnation proceedings was Kirk Industries described as the owner of any interest in the condemned parcel. The record clearly demonstrates also that Kirk Industries was never made a party to the proceedings or otherwise notified of their pendency. The record reveals, further, that no attempt was ever made

to locate the whereabouts of Kirk Industries. Finally, the Viewers' award makes no reference to Kirk Industries' interest in the subsurface coal and makes no apportionment between Mazzaro and Kirk Industries of the damages assessed.

Since the decision of the Commonwealth Court in this matter, two depositions were taken which impact on the questions of notice and the assessment of damages.

First, the deposition of William N. Nicholls revealed that Allegheny County was aware of the interest of Kirk Industries in the condemned parcel as well as the whereabouts of Kirk Industries. Mr. Nicholls was employed by Allegheny County during the relevant period as Director of the Claims and Investigations Department. In that capacity, Mr. Nicholls worked with the County Law Department to arrive at a figure to compensate Mike Mazzaro for his interest in the surface of the condemned parcel. In this endeavor, Mr. Nicholls discovered the interest of Kirk Industries in the subsurface coal and reported that fact to the County Law Department. Mr. Nicholls testified further that the whereabouts of Kirk Industries was known at the time and it was concluded that the County would *not* condemn the coal at that time.

Second, the deposition of Thomas P. Trimble revealed that no evidence was introduced before the Board of Viewers concerning any interest of Kirk Industries in the subsurface coal. Further, that the Viewers' award did not include any compensation for the subsurface coal. Mr. Trimble discerned this from the fact that the Viewers' award did not apportion any damages to any interest other than that of Mike Mazzaro.

In *Schroeder v. City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed 2d 255 (1962), the U. S. Supreme Court applied the due process principles enunciated in *Mullane* in the context of an eminent domain proceeding. In *Schroeder, supra*, the City of New York instituted proceedings to divert a portion of the Neversink River, thereby affecting certain riverfront property owned by appellant. Pursuant to statute, the only notice given appellant was by publication and posting. In addition, although appellant's name and address was readily ascertainable, neither the publication nor posted notices contained the name of appellant.

In holding that the notice to appellant did not measure up to the quality of notice which the due process clause requires, the Court reasoned from *Mullane* that the general rule is that notice by publication is not enough. If the names and addresses of those whose legally protected interests are directly affected by the proceedings are easily ascertainable, then the reason for resort to a means less likely than the mails to apprise them of its pendency disappears. The clear result of the *Schroeder* Court is that in condemnation proceedings, if due process is not afforded, the property interest of the owner cannot be foreclosed.

## Conclusion

The decision of the Commonwealth Court of Pennsylvania conflicts directly with the constitutional mandate of this Court in both *Mullane v. Central Hanover Bank & Trust Co., supra*, and *Schroeder v. City of New York.*

The record in the case at bar reveals that no effort was made to notify Kirk Industries of the pendency of any proceedings. In fact, in later discovery, it was revealed that Allegheny County intentionally failed to name Kirk Industries as a party.

Therefore, the purported condemnation was a nullity and the decision of the Commonwealth Court must be remanded.

Respectfully submitted,

BRANDT, MILNES & REA
HENRY E. REA, JR.
*Counselor for Petitioner*
*Carol M. Captline*

# APPENDIX

**Order of the Supreme Court of Pennsylvania entered September 20, 1983, denying Petition for Allowance of Appeal**

THE SUPREME COURT OF PENNSYLVANIA
Western District

Carl Rice, Esq.
Prothonotary
Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219

September 22, 1983

Carl Brandt, Esquire
301 B. McKnight Park Drive
Pittsburgh, PA 15237

*IN RE:* Carol M. Captline, *et al.* v.
County of Allegheny
No. 176 W.D. Allocatur Docket, 1983

Dear Mr. Brandt:

This is to advise you that your Petition for Allowance of Appeal in the above-captioned matter was denied by the Court on September 20, 1983.

Very truly yours,

CARL RICE
Carl Rice, Esq.

CR:kk
cc: Samuel P. Kamin, Esquire
Richard B. Tucker, Esquire
Honorable John A. MacPhail

**Opinion and Order of the Commonwealth Court of Pennsylvania entered May 2, 1983**

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

---

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

v.

COUNTY OF ALLEGHENY,

CAROL M. CAPTLINE, Co-Executor of the
Estate of MIKE MAZZARO, Deceased,
*Appellant.*

---

No. 2865 C.D. 1981

---

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

---

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

v.

SOLOMON & TESLOVICH, INC. and
RAM CONSTRUCTION CO., INC.,

CAROL M. CAPTLINE, Co-Executor of the
Estate of MIKE MAZZARO, Deceased,
*Appellant.*

---

No. 5 T.D. 1982

---

*Appendix—Opinion and Order of the Commonwealth Court of Pennsylvania entered May 2, 1983.*

Before:

HONORABLE JAMES CRUMLISH, JR.,
*President Judge*
HONORABLE JOHN A. MacPHAIL, *Judge*
HONORABLE JOSEPH T. DOYLE, *Judge*

ARGUED: October 6, 1982

OPINION BY JUDGE MacPHAIL FILED May 2 1983

Carol M. Captline and Equibank N.A. (Appellants) have brought these appeals from orders of the Court of Common Pleas of Allegheny County sustaining the preliminary objections of Allegheny County (County) to a petition for the appointment of viewers as well as the preliminary objections to a complaint in trespass and for an accounting filed by Solomon and Teslovich, Inc. and Ram Construction Company, Inc.

The facts of this case are stipulated.[1] Appellants are co-executors of the estate of Mike Mazzaro. Mazzaro acquired title to a 104.085 acre tract of land in Findlay Township, Allegheny County by a deed executed on February 17, 1955, from Cosgrove Coal Company[2] (Cosgrove Coal). The deed expressly excepted and reserved to Cosgrove Coal all the mineral rights underlying the tract of land.

On March 4, 1958 and May 5, 1959, the Board of Commissioners of Allegheny County (Commissioners) condemned (hereinafter the 1958/1959 condemnation) the

[1] Although the trial court refers to "stipulated facts," there is no written stipulation of facts. Rather, the record of this case consists entirely of documentary evidence uncontested by either party.

[2] The deed was recorded in the Allegheny County Office for the Recording of Deeds on February 28, 1955.

tract of land for the purpose of constructing an airport.[3] The resolutions provided in pertinent part for the acquisition of title of the lands described "in fee simple, said property being owned by Mike Mazzaro." The County filed a petition for the appointment of viewers in the Court of Common Pleas. Notice was given to Mazzaro, was posted on the property and was published in three local papers. The report of viewers, submitted to the Court of Common Pleas on October 19, 1961, determined the value of the property condemned to be $71,980.[4] The report did not allocate any amount of the award to Cosgrove Coal, nor did it make any reference to the coal interest. No appeal was taken from this report and Mazzaro received the full amount of the award.

On September 20, 1965, Cosgrove Coal[5] conveyed to Mazzaro, by way of quitclaim deed, all the mineral rights to the tract of land "together with the appurtenances thereunto belonging and all the estate, right, title and interest, claim or demand whatsoever of [Cosgrove Coal]." Nothing further occurred until July 18, 1979, when the Commissioners entered into a contract with Solomon & Teslovich for the grading, paving, drainage and lighting for the extension of a taxiway at the airport. The contract authorized the contractor to take possession of any coal excavated in the process of

[3] Section 2402(c) of the Second Class County Code, Act of July 28, 1953, P.L. 623, *as amended*, 16 P.S. §5402(c) gives the County authority to condemn land for the purpose of establishing and maintaining air navigation and terminal facilities. The airport is now known as the Greater Pittsburgh International Airport.

[4] Including compensation for delay in payment.

[5] By certificate of amendment to the corporation's articles of incorporation dated March 1, 1955, the name of Cosgrove Coal was changed to Kirk Industries, Inc.

construction. This contract was subsequently assigned to Ram Construction which, in the course of construction, did remove coal underlying the tract of land herein at issue.

Appellants then filed their petition for the appointment of viewers pursuant to Section 502(e) of the Eminent Domain Code (Code), Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §1-502(e), as well as an action in trespass against Solomon & Treslovich and Ram Construction. All defendants filed a variety of preliminary objections, which were consolidated for hearing and disposition by the trial court. The court held that the coal interest was validly taken by the 1958/1959 condemnation and was fully paid for pursuant to the award of the 1961 report of viewers, that any rights arising from Cosgrove Coal's claim to the coal interest were lost due to Cosgrove Coal's failure to assert any claim before the viewers after due notice had been provided, and that regardless of whether notice was properly given, any claim Mazzaro obtained from Cosgrove Coal would not be against Allegheny County, but rather would be against Mazzaro, who received the 1961 award, and thus the claim was extinguished by merger. The trial court thus sustained the preliminary objections and dismissed both actions. Appellants timely filed appeals from both dismissals.[4]

[4] The County, in its brief, contends that the appeals should be dismissed for failure to file exceptions pursuant to Pa. R.C.P. 1038(d). The sustaining of preliminary objections to a petition for appointment of viewers is a final order and there is no requirement that exceptions to such a ruling be filed with the trial court *en banc*. *See Petition of Ramsey*, 31 Pa. Commonwealth Ct. 182, 375 A.2d 886 (1977). Furthermore, our Court held that the Rules of Civil Procedure

*Appendix—Opinion and Order of the Commonwealth Court of Pennsylvania entered May 2, 1983.*

Our scope of review in eminent domain cases is limited to a determination of whether the court abused its discretion or committed an error of law. *Speicher Condemnation Appeal*, 58 Pa. Commonwealth Ct. 321, 324-25, 428 A.2d 282, 284 (1981).

The first issue which we must address is the extent of the 1958/1959 condemnation. Appellants argue that the condemnation effected only a taking of the surface estate[7] in fee simple and was not a taking of the mineral rights. Therefore, Appellants contend, the 1979 removal of the coal constituted either a trespass or a de facto taking. The question presented, then, is: what did the County intend when it resolved to take the property described "in fee simple, said property being owned by Mike Mazzaro"?

The term "fee simple" properly defined refers to the extent of alienability one would enjoy in the ownership of land. Black's Law Dictionary defines a fee simple estate as "one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and descending to his heirs and legal representatives upon his death intestate." *Id.* at 742 (4th Ed. 1968). It seems clear that this meaning of the term

---

are inapplicable to an eminent domain proceeding. *See, e.g., Department of Transportation v. Hess*, 55 Pa. Commonwealth Ct. 27, 423 A.2d 434 (1980). As for the trespass action, Rule 1038 by its terms applies only to "the *trial* of an action" and therefore is inapplicable to a disposition on preliminary objections. An order sustaining preliminary objections in the nature of a demurrer is a final order. *See Hudock v. Donegal Mutual Insurance Co.*, 438 Pa. 272, 264 A.2d 668 (1970).

[7] And the necessary surface support.

was intended by the Legislature when it gave the County the power to take land in fee simple.[8] Therefore, the statutory meaning of fee simple does not provide an answer to the question of the intent of the County in the 1958/1959 condemnation concerning these mineral rights. *Cf. Starkey v. City of Philadelphia*, 397 Pa. 512, 156 A.2d 101 (1959) (At issue was whether a base or full fee was taken for an airport pursuant to Section 2 of the Act of May 12, 1925, P.L. 614, 53 P.S. 14162).

There exists a body of law, however, which does discuss the *extent* of ownership rights. "The ownership of the surface carries with it, if there be no obstacle to the application of the general rule, title downward to the center of the earth and upward indefinitely." *Delaware and H. Canal Co. v. Hughes*, 183 Pa. 66, 69, 38 A. 568, 569 (1897). "That a title in fee to land is a title to everything seems an elementary statement. . . ." *Brooks v. Shepard*, 157 F.Supp. 379, 382 (S.D. Ala. 1957) (applying Alabama law). Thus, one would expect in the normal case that a taking of land in fee would also involve a taking of the minerals. *Brooks v. Shepard. Cf. Sunbeam Coal Corp. v. Pennsylvania Game Commission*, 37 Pa. Commonwealth Ct. 469, 391 A.2d 29 (1978) (wherein the Game

[8] The common law and early Pennsylvania law view concerning the estate acquired by condemnation was that only a conditional fee (with possibility of reverter) or an easement was taken. *See Pittsburgh National Bank v. Equitable Gas Company*, 421 Pa. 468, 220 A.2d 12, *cert. denied*, 385 U.S. 988 (1966); *Long v. Monongahela City School District*, 395 Pa. 618, 151 A.2d 461 (1959). However, in 1937 the Legislature provided a method by which these lesser estates could be expanded into a full fee. Act of July 2, 1937, P.L. 2793, *as amended*, 53 P.S. §§1171-1173. In 1949, the Legislature gave to political subdivisions the general power to condemn in fee simple. Act of April 14, 1949, P.L. 442, 26 P.S. §201.

Commission filed a condemnation resolution in fee simple leading a mineral rights owner to file a petition for appointment of viewers, after which the Commission clarified its position as a taking of the surface only).

The problem which is presented here is that Pennsylvania law recognizes three distinct estates in land which can be held in fee simple separate and distinct from each other: the surface, the mineral rights and the right of support. *See, e.g., Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 32 A.2d 227 (1943). Here, at the time of the condemnation, it would seem that the "property being owned by Mike Mazzaro" did not include the mineral rights. Still, we cannot subscribe to a view that holds that the actual extent of Mazzaro's ownership per se delineates the extent of the County's intended condemnation. *Cf. Curtis v. Redevelopment Authority of Philadelphia*, 482 Pa. 58, 393 A.2d 377 (1978) (Petition for appointment of viewers did not mention easement, yet easement was found to be condemned with the fee simple). Rather, we believe that, absent evidence that the County *in fact* knew of the existence of a separate mineral estate owner or other evidence indicating contrary intent, such as the type of evidence presented to the viewers for their consideration, *see Cushing v. Gillespie*, 208 Okla. 359, 256 P.2d 418 (1953), a condemnation in fee simple of a tract of land must be considered a condemnation of all estates in the land. *Cf. Porter v. Commonwealth*, 419 Pa. 596, 215 A.2d 646 (1966) (In defining the word "property" in Section 507 of the Code, 26 P.S. §1-507, the Court refused to split a single land condemnation into multiple proceedings in the face of condemnee's claim that its fee

simple interest in the minerals was a separate property); *Department of Transportation v. Haydu*, 1 Pa. Commonwealth Ct. 561, 569, 276 A.2d 346, 350 (1971) (where Judge Rogers quoted with approval the appellee's argument in *Porter* that "[t]he doctrine of fee simple ownership of minerals should be limited to the field of mineral law, from whence it derived and should not be extended to the law of eminent domain where it is neither practical or logical"). In the record before us, there exists no evidence from which a contrary intent can be inferred. The County's intention to construct airport facilities seems to us, on the other hand, to provide further support for an inference that the County did intend to condemn *all* estates in the land.[9]

Having determined, in agreement with the trial court, that the County intended to condemn the mineral interests by the 1958/1959 condemnation, we must next examine Appellant's claim that a present action seeking compensation would not be barred because the County failed to give Cosgrove Coal proper notice. The trial court concluded, and we agree, that there was compliance with the *statutory* provisions for posting and publication of notice in effect at that time. However, we disagree with the trial court that the evidence presented shows that the notice provided complied with the notice mandated by the due process clause of the fourteenth amendment. U.S. Const. amend. XIV, §1. In this regard the case of *Curtis v. Redevelopment Authority of*

[9] We would note that according to the 1955 deed, Mazzaro purchased his surface interest for $6,000 and in 1961 received an award of $71,989, suggesting that the viewers considered that more than the surface interest was being condemned.

*Philadelphia*. 482 Pa. 58, 393 A.2d 377 (1978) is controlling. In *Curtis* an easement holder of record was not given notice of the 1960 condemnation of the servient tenement. The Court, after a review of relevant state and federal cases, held:

> There was no affirmative burden on [the easement holder] to inspect the servient estate in order to be put on notice by the postings. To the contrary, the burden was on the Authority to conduct a search for recorded interests and then to take reasonable steps to notify holders of such recorded interests. To hold otherwise would countenance the practice of the Authority of ignoring the recording system of this jurisdiction.

*Id.* at 65, 393 A.2d at 380 (footnote omitted).

Cosgrove Coal's interest was easily determinable through a simple title search. Thus the County was required to undertake "reasonable steps" to provide actual notice to Cosgrove Coal. Unfortunately, we are unable to determine what "reasonable steps" would be in this case. The stipulated facts do not disclose whether Cosgrove Coal received actual notice, or whether Cosgrove Coal's mailing address could have been ascertainable. Further evidence is necessary before a determination can be made as to whether posting and published notice alone satisfied the requirements of due process in this matter.

The trial court, recognizing the importance of Appellant's due process claims, determined that it would also analyze whether Mazzaro[10] could assert any further claim against the County in light of the 1961 award. The

[10] And consequently his estate.

court held that Mazzaro did acquire all rights subsequent to the condemnation which Cosgrove Coal may have had as a result of the taking,[11] but that Mazzaro's claim was against himself and not the County as a result of his receipt of the 1961 award. The Court reached this conclusion by interpreting Section 2627 of the Second Class County Code[12]—"Upon payment of the compensation for land or property in accordance with the order of distribution, all claims for compensation shall be deemed paid and satisfied"—to mean that, as a matter of law, the 1961 award was full compensation for all damages.

We would certainly agree with the trial court that the purpose of Section 2627 is to ensure that the full measure of damages is determined in a single proceeding. However, this case presents a unique set of circumstances. There is nothing in the documentary evidence before us to show that the viewers gave full consideration to the value of the coal interest, nor can we determine from that evidence that Mazzaro took any active steps to acquire compensation for the coal interest from the viewers in 1961. Cosgrove Coal certainly did not

[11] Generally, one who acquires title to property subsequent to the time of taking is not entitled to bring an eminent domain proceeding. *Rednor & Kline, Inc. v. Department of Highways*, 413 Pa. 119, 121, 196 A.2d 355, 356 (1964). *See Green v. Pittsburgh*, 311 Pa. 132, 166 A. 586 (1933). The trial court held that the quitclaim deed transferred Cosgrove Coal's personal claim to Mazzaro. That ruling has not been contested on appeal.

[12] 16 P.S. §5627. The Second Class County Code provisions on eminent domain were applicable at the time of the condemnation of the property.

present any claim for damages and the viewers did not pay into court an award for the coal interest.[13] Disregarding for the moment the transfer of Cosgrove Coal's claim to Mazzaro, principles of fairness dictate that a person who was never notified of a condemnation and whose interest was not protected in the proceedings must later be permitted to seek compensation from the condemning authority. *See Curtis.* If compensation was improperly paid to other parties, then it should be the condemnor's duty to obtain reimbursement.[14]

We do recognize, however, that Cosgrove Coal's claim *was* transferred to the party, Mazzaro, who the County contends was previously paid for the interest. We have no desire to allow Mazzaro's estate to obtain a windfall as a result of these unique set of circumstances, especially in light of the apparently high compensation Mazzaro received in comparison to his purchase price. *See* note 9, *supra.* Therefore, should this case on remand proceed to a Board of View, the viewers must consider the extent to which Mazzaro did obtain compensation previously for the mineral interest and award damages only to the extent not previously compensated. *Cf. Department of Transportation v. Gardone,* 67 Pa.

[13] *See* Section 2630 of the Second Class County Code, 16 P.S. §5630.

[14] This situation differs from that presented in *Green v. Pittsburgh,* 311 Pa. 132, 166 A. 586 (1933), in which a tenant in common's name was stricken from the caption of an eminent domain proceeding and all damages were paid to the other co-tenant. The Court determined that the aggrieved owner should have known of the striking of his name and thus held that he had no further claim against the condemnor. It is also obvious from the case that the extent of damages to his estate were fully compensated by the viewers, albeit to the wrong party.

Commonwealth Ct. 273, 446 A.2d 1369 (1982) (damages not contemplated in prior condemnation can be compensated in later action). The trial court on remand shall consider the question of notice, in accordance with this opinion's previous treatment of that issue. Once the Court determines when notice was provided to the owner of the mineral interest, it can then answer the question of the applicability of the statute of limitations, which was raised before, but not determined by, the court. In this regard, the trial court should note the Supreme Court's determination on the statute of limitations question in *Curtis*, 482 Pa. at 65, 393 A.2d at 380.

The trial court's dismissal of the trespass action is affirmed in view of our determination that the coal interest was subject to the prior condemnation. *See Curtis.*

JOHN A. MacPHAIL
John A. MacPhail, *Judge*

*Appendix—Opinion and Order of the Commonwealth Court of Pennsylvania entered May 2, 1983.*

ORDER

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

v.

COUNTY OF ALLEGHENY,

CAROL M. CAPTLINE, Co-Executor of the
Estate of MIKE MAZZARO, Deceased,
*Appellant.*

No. 2865 C.D. 1981.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

v.

SOLOMON & TESLOVICH, INC. and
RAM CONSTRUCTION CO., INC.,

CAROL M. CAPTLINE, Co-Executor of the
Estate of MIKE MAZZARO, Deceased,
*Appellant.*

No. 5 T.D. 1982.

*Appendix—Opinion and Order of the Commonwealth Court of Pennsylvania entered May 2, 1983.*

The order of the Court of Common Pleas of Allegheny County in No. GD 81-02291, dated October 30, 1981, is reversed and remanded for proceedings not inconsistent with this opinion.

The order of the Court of Common Pleas of Allegheny County in No. GD 81-03197, dated October 30, 1981, is hereby affirmed.

Date May 2, 1983.

JOHN A. MACPHAIL
John A. MacPhail, *Judge*

Certified from the Record
May 2-1983
Francis C. Barbush
*Chief Clerk*

**Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, Entered October 30, 1981**

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania
Civil Division

---

CAROL M. CAPTLINE and EQUIBANK, N.A.,
as Co-Executors of the Estate of
Mike Mazzaro,

*Plaintiffs,*

v.

COUNTY OF ALLEGHENY,

*Defendant.*

---

No. GD 81-02291
Issue No.
Code

---

CAROL M. CAPTLINE and EQUIBANK, N.A.,
as Co-Executors of the Estate of
Mike Mazzaro,

*Plaintiffs,*

v.

SOLOMON & TESLOVICH, INC., and
RAM CONSTRUCTION CO., INC.,

*Defendants.*

---

No. GD 81-03197
Issue No.
Code 009

---

*Appendix—Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, Entered October 30, 1981.*

OPINION AND ORDER

Filed by

HONORABLE SILVESTRI SILVESTRI

JUDGE

Copies to
Carl Brandt, Esq.
Anthony P. Picadio, Esq.
Samuel Kamin, Esq.

OPINION.

SILVESTRI, J.

Plaintiffs Carol Captline and Equibank, N.A., as co-executors of the estate of Mike Mazzaro, have initiated two actions to recover the value of coal underlying land condemned by Allegheny County for air navigation and terminal facilities. The action at No. GD 81-02291, a petition for the appointment of viewers, was instituted against defendant Allegheny County pursuant to Section 502(e)[1] of the Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. §1-502(e), alleging a *de facto* taking of coal and other minerals underlying the property condemned by Allegheny County. An action in trespass and for an accounting, at No. GD 81-03197, was instituted against defendants Solomon and Teslovich, Inc. and Ram Construction Company, Inc.[2] alleging a

[1] Section 502(e) of the 1964 Eminent Domain Code provides: "If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers . . ., setting forth such injury.

[2] Both defendants are Pennsylvania corporations having their principal offices or places of business in Pennsylvania.

willful and unlawful invasion of the interest claimed by the plaintiffs, resulting from the removal of coal during construction at the Greater Pittsburgh International Airport.

Preliminary objections, which will be set forth herein, to the petition for the appointment of viewers were filed on behalf of Allegheny County[3]; similarly, preliminary objections to the complaint in trespass and for an accounting set forth herein, were filed by Solomon and Teslovich and Ram Construction. The preliminary objections filed in both actions were consolidated for hearing because the factual basis for the claims presented by the plaintiffs and the legal issues raised by the facts, the resolution of which will control the outcome of the actions, are substantially the same.

During the hearing on the preliminary objections the parties stipulated to the facts which are presented below. Plaintiffs' decedent Mike Mazzaro acquired title to a tract of land, which encompassed 104.085 acres and was located in Findlay Township, Allegheny County, Pennsylvania, by a deed executed on February 17, 1955 from grantor Cosgrove Coal Company. The description of the property conveyed contained a clause which expressly excepted and reserved to Cosgrove Coal, its successors and assigns, all the coal, gas, oil, limestone and other minerals underlying the described tract of land.

---

[3] Sections 406 and 504 of the Eminent Domain Code, as amended, 26 P.S. §§1-406, 1-504, provide for preliminary objections to be the exclusive manner of legally and factually testing the sufficiency of a petition for the appointment of viewers alleging a *de facto* taking. *City of Philadelphia v. Airportels*, 14 Pa. Cmwlth. 617, 322 A.2d 727 (1974).

*Appendix—Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, Entered October 30, 1981.*

On March 4, 1958, the County Commissioners of Allegheny County adopted a resolution authorizing the County of Allegheny to acquire by condemnation 88.1+ acres of the 104.085 acre tract owned by plaintiffs' decedent for the purpose of establishing and maintaining thereon air navigation and terminal facilities pursuant to the provisions of Article XXIV of the Second Class County Code[4]. On May 5, 1959, the Commissioners of Allegheny County adopted a similar resolution authorizing Allegheny County to acquire by condemnation the remaining 15.536 acres of land of the original tract of land owned by the decedent for air navigation and terminal facilities.

Each resolution provided in relevant part:

> "That the said Commissioners deem it advisable and necessary to acquire by condemnation, certain land situate in Findlay Township, Allegheny County, Pennsylvania, hereinafter described, for the purpose of establishing and maintaining thereon air navigation and terminal facilities, and in connection therewith to take private property and acquire title thereto, *in fee simple**, said property being owned by Mike Mazzaro."

A petition for appointment of viewers was filed by the County of Allegheny through its Board of Commissioners requesting the court to appoint a Board of Viewers to ascertain and award just compensation *"to all persons"** for their condemned property, and by order of court dated May 4, 1961, then Judge O'Brien of this

---

[4] 16 P.S. §§5401-5408.

*Emphasis ours.

court appointed viewers and directed the same to view the affected premises, to hold meetings as should prove necessary, to hear all parties and witnesses, and to award just compensation for the damages sustained as a result of the improvement to the properties[5]. In addition, Judge O'Brien directed the viewers to give all parties notice as required and where notice was required by publication to publish such notice in the *Pittsburgh Post-Gazette*, the *Pittsburgh Press* and the *Pittsburgh Legal Journal* and to file a report with this court upon a specific date.

The report of viewers was submitted on October 19, 1961 indicating the due notice required by law of the time and place fixed for viewing the condemned property was given[6], that the viewers had heard the testimony of the interested parties and their witnesses, and the viewers had estimated the value of the condemned property as of the date of the condemnation was $71,980. No appeal from the award was taken. The award made was not apportioned between Mazzaro and Cosgrove Coal Company.

On September 20, 1965, a deed conveying the interest of Kirk Industries, Inc.[7] to Mike Mazzaro in all of the

---

[5] The proceedings initiated by the filing of the petition for the appointment of viewers are docketed in this court at No. 1528 July Term, 1961 and were introduced at the hearing on preliminary objections as Exhibit 4.

[6] On May 16, 17 and 18, 1961, notice was published in the *Pittsburgh Press*, *Post-Gazette* and *Legal Journal* informing all parties in interest of the meeting of the board of viewers at which the parties might appear.

[7] By certificate of amendment to the corporation's articles of incorporation dated March 1, 1955 the name of Cosgrove Coal Company was changed to Kirk Industries, Inc.

minerals, including coal, gas, oil and limestone, underlying nine tracts of land in Allegheny County was executed. Mike Mazzaro acquired the interest of Kirk Industries in the minerals underlying the 104.085 acre tract, referred to in the deed as Tract Four, which had been condemned by the County through the deed purporting to convey all of the mineral rights and privileges in the tracts of land described "(t)ogether with the appurtenances thereunto belonging and all the estate, right, title, and interest, claim or demand whatsoever of . . . (Kirk Industries) to have and to hold the above-described property . . . unto the party of the second part, his heirs and assigns forever."[8]

On July 18, 1979, Solomon and Teslovich entered into a contract with the Board of Commissioners of Allegheny County for the grading, paving, drainage and lighting for the extension of a taxiway, referrred to as Taxiway N-1, at the Greater Pittsburgh International Airport. The contract authorized the contractor to take possession of the coal excavated in areas designated as "Borrow Area B", "Borrow Area D" and undercut area. Supplemental specifications provided, in part:[9]

> ". . . pockets of coal may be encountered. The Contractor may either remove this coal to the designated waste area or the Contractor may take

---

[8] The deed was recorded in the Office of the Recorder of Deeds of Allegheny County at Deed Book Volume 4310, page 104 and was introduced as Exhibit 5. Specific reference to Tract 4 may be found at page 106 while the language of the deed quoted may be found at page 110.

[9] The specifications concerning coal removal were introduced as Exhibit 6.

possession of the coal and dispose of it off of airport property at his expense."

On July 18, 1979, Solomon and Teslovich assigned all of its right, title, and interest in the contract to Ram Construction and executed a written assignment to this effect. The president of Ram Construction signed an instrument accepting the assignment and agreeing to assume and perform all of the duties and obligations to be performed by Solomon and Teslovich under the original contract. In the course of construction Ram Construction removed coal underlying the 104.085 acre tract.

As a result, plaintiffs filed the petition for the appointment of viewers asserting, as the legal basis of the claim, a taking by the County for which they would be entitled to seek the appointment of viewers to assess damages pursuant to Section 502(e) of the Eminent Domain Code[10], 26 P.S. §1-502(e). Plaintiffs alleged the contractual language of the supplemental specifications providing for removal and disposal of minerals owned by the estate of Mike Mazzaro, coupled with the contractor's actual removal and sale of the minerals, constituted an exercise of dominion and control by Allegheny County. The plaintiffs further alleged that by such actions Allegheny County had taken and deprived the estate of its ownership rights in the minerals so as to cause a condemnation and taking of the rights, entitling the plaintiffs to just compensation. The preliminary

[10] Section 502(e) provides: "If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers . . . setting forth such injury."

objections filed on behalf of Allegheny County asserted: (1) plaintiffs failed to state a cause of action; (2) if a taking occurred, the plaintiffs' action is barred by the statute of limitations; (3) the action should be dismissed as plaintiffs should be estopped from denying title to the minerals rested in Allegheny County; (4) the plaintiffs are not entitled to bring the cause of action, claiming laches; and (5) the allegations set forth in the petition are insufficient as a matter of law to support a *de facto* taking.

Plaintiffs alleged in the action in trespass that repeated demands to cease removal of the minerals were made to and ignored by defendants Solomon and Teslovich and Ram Construction and that defendants have sold large quantities of merchantable minerals and have refused to account to the plaintiffs for such sale and to pay the estate the value thereof. Plaintiffs further alleged the defendants willfully and unlawfully invaded the plaintiffs' interest in the minerals by entering upon, extracting and selling the coal.

The preliminary objections filed on behalf of Solomon and Teslovich and Ram Construction asserted: (1) that the court lacked jurisdiction to hear the action, claiming the plaintiffs acquired only a claim against the County for damages in an eminent domain proceeding; (2) by demurrer, the complaint failed to state a claim of ownership to the minerals because the claim is barred by estoppel; (3) the complaint in trespass and for an accounting failed to state a cause of action; and (4) the complaint failed to state a cause of action against Solomon and Teslovich in that it alleged the defendant

assigned all of its rights and duties under the contract to Ram Construction Company.

The preliminary objections filed in each action are before this court for disposition.

We note at the outset the resolutions of the Board of County Commissioners adopted March 4, 1958 and May 5, 1959 were adopted pursuant to the Second Class County Code[11] prior to the enactment of the Eminent Domain Code of 1964[12]. Thus, the procedure to condemn property is governed by the Second Class County Code (herein County Code).

Article XXIV of the County Code, entitled "Aeronautics"[13] grants the rights and authority to establish, construct and provide for air navigation facilities to the County. Section 5402(c) of Article XXIV provides:

> "The county may acquire by . . . condemnation proceedings any land lying within its territorial limits . . . which, in the judgment of the county commissioners, may be necessary and desirable for the purpose of establishing and maintaining air navigation and terminal facilities . . .."

The proceedings for the condemnation of lands under Article XXIV were to be conducted in the manner provided under Article XXVI of the County Code, entitled "Eminent Domain and Injury to Property" and

---

[11] Act of 1953, July 28, P.L. 723, Art. I, §101 *et seq.*, 16 P.S. §§3101-6302.

[12] Act Special Sessions, June 22, 1964, P.L. 84, Art. I, Sec. 101, 26 P.S. §§5401-5408.

[13] Act of 1953, July 28, P.L. 623, Art. XXIV, §2401, 16 P.S. §§5401-5408.

title acquired by virtue of condemnation proceedings was title in fee simple[14].

Section 5608 established the necessary procedure for acquiring property by condemnation. Subsection (a) states:[15]

> "(a) In case the board of commissioners or a majority of them and the parties interested in the land, property or material appropriated, injured or destroyed by the county fail to agree upon the compensation to be made for the land, property or material so taken, injured or destroyed, upon petition of such commissioners or a majority of them or any person or parties interested and whose land, property or material is affected thereby to the court of common pleas of said county, the said court shall appoint three viewers from the county board of viewers, and appoint a time, not less than twenty nor more than thirty days thereafter, when said viewers shall meet and view the land, property or material to be so appropriated, injured or destroyed."

As stipulated to by the parties, a petition for the appointment of viewers was filed accordingly. The appointed viewers were then required to "... give at least ten days' notice, by publication in one newspaper of general circulation in the county once ... of the time and place of their first meeting, and ... (to) give notice thereof by handbills posted in conspicuous places in the vicinity of the proposed public improvement."[16]

[14] Act of 1953, July 28, P.L. 723, Art. XXIV, §2403, 16 P.S. §5403.
[15] Act of 1953, July 28, P.L. 723, Art. XXVI, §2608, 16 P.S. §5608.
[16] Act of 1953, July 28, P.L. 723, Art. XXVI, §2608, 16 P.S. §5608(b).

The exhibits introduced at the hearing of the preliminary objections indicate that notice by publication had been properly given and, as previously noted, the report of viewers indicated the due notice required by law of the viewing was given.

The initial question which must be resolved is whether Allegheny County acquired title to the underlying minerals when it condemned in fee simple the property held by plaintiffs' decedent in 1958 and 1959. We conclude Allegheny County did acquire the title to the underlying minerals in 1958 and 1959.

The term "fee simple" has been defined as "(t)he largest estate in real property that an owner can have . . .. It is the unconditional ownership. It is the sum total of all other estates, each of which is but a part of the whole fee simple estate." Ladner, Conveyancing in Pennsylvania, Revised Fourth Edition, Volume I, Section 1.03(a), page 5.

The plaintiffs concede certain subsurface rights accrue to a public authority acquiring title to property by eminent domain, including the right of support; however, plaintiffs argue the Pennsylvania case law recognizes title to subsurface minerals are a separate estate in land which may be held in fee simple and that, as a result, a condemnation of property in fee simple may not evince an intent to acquire mineral rights title to which has been severed from the surface.

Plaintiffs further argue that at the time of the condemnation of the 104.085 acre tract required a condemnor to separately condemn a mineral estate which had been severed from the surface.

The defendants agree that the law of Pennsylvania recognized that while for some purposes the concept of a fee simple estate in minerals was valid, the claim that condemnation of the fee simple in land does not encompass an interest in the underlying minerals, even though the interest may be a fee simple, was not a viable argument. In support thereof, the defendants cite the Pennsylvania Commonwealth Court's holding in *Commonwealth of Pennsylvania, Department of Transportation v. Haydu*, 1 Pa. Cmwlth. 561, 276 A.2d 346 (1971) that while the concept of a distinct and separate fee simple title in minerals from the fee simple ownership of the land is an important concept in the field of mineral law, it should not be incorporated into the field of eminent domain law.

In *Commonwealth of Pennsylvania v. Haydu*, the Court was reviewing a lower court ruling that Section 507(a) of the Eminent Domain Code of 1964, Special Session, June 22, P.L. 84, Art. I, Sec. 101, 26 P.S. §1-101 was not applicable in a case involving two fee simple estates—one in the surface and the other in the coal—, that the coal owners possessed a separate property, and that the claims would be assessed independently and not apportioned from an amount determined as the total damages to the property. In reversing the lower court, the Commonwealth Court held that the term "condemned property" included all of the property as defined by the surface, including an estate in sub surface minerals.

In its opinion, the Commonwealth Court discussed at length the case of *Porter v. Commonwealth*, 419 Pa. 596, 215 A.2d 646 (1966) in which the Supreme Court was

faced with and decided the question of the standing of a fee simple in underlying minerals. The Commonwealth Court, in support of its holding, stated:

> "The appellee in *Porter* argued . . . 'it must be noted that the appellee's position is that it is immaterial whether . . ., the common mineral lessee, actually owned the minerals in question in fee simple. Rather the appellee's contention is that it is common ownership of the surface which is necessary.' Its conclusion was in part: 'The doctrine of fee simple ownership of minerals should be limited to the field of mineral law from whence it derived and should not be extended to the law of eminent domain where it is neither practical of logical.' "

*Commonwealth of Pennsylvania v. Haydu, supra,* at 569.

The defendants acknowledge *Commonwealth v. Haydu, supra,* involved the interpretation and application of the Eminent Domain Code of 1964, which was not in effect at the time the 104.085 acre tract was condemned but argue the case stands as valid authority for the proposition that, for eminent domain purposes, the surface area of land and the underlying minerals are a single property, although the surface and mineral rights may be separately owned in fee simple. We agree that the analysis underlying and supporting this proposition is no less a cogent approach under the 1937 Eminent Domain Code than under the Eminent Domain Code of 1964.

As previously noted, the Legislature provided that title acquired by virtue of a condemnation under the Second

Class County Code shall be a title in fee simple. In light of this provision, as well as the language of the 1958 and 1959 resolutions which indicated the commissioners intended to condemn and acquire the title to the property described, and the accepted definition of the term "fee simple", and in recognition of the theory underlying the Commonwealth Court's holding in *Commonwealth v. Haydu, supra*, we conclude as a matter of law that the 1958 and 1959 resolutions adopted by the county commissioners effected a condemnation of all the interests in the 104.085 acre tract, including any interest in the subsurface minerals.

The plaintiffs argue, however, that if a prior formal condemnation was effected by the 1958 and 1959 resolutions and condemnation proceedings, their claim for proceeds is not barred because the viewers failed to comply with the notice provisions of the County Code and because the notice thereof as required by law was not given to Cosgrove Coal Company. The plaintiffs admit notice by publication was given pursuant to the provisions of the County Code but claim there is nothing in the record to indicate the property was posted or that there was anything done to the property to put an owner on notice of the condemnation prior to the construction performed in 1979.

We do not agree the record is devoid of evidence the viewers complied with the statutory requirements in the County Code regarding notice. The condemnation proceedings, docketed at No. 1528 July Term, 1961, which were introduced as an exhibit in the hearing before this court, revealed that a report signed by the viewers

stated the due notice, as required by law, of the time and place fixed for the viewing was given. The required notice included the posting of the handbills. From the report of the viewers we may conclude that handbills had in fact been posted, thus satisfying the statutory requirements of notice and supporting a dismissal of the plaintiffs' claims.

The statutory requirements of notice direct the Board of Commissioners to publish notice in the local newspapers and to post notice of the condemnation on the property involved. We cannot conclude that such notice is constitutionally defective.

In *Schroeder v. City of New York*, 371 U.S. 208, 83 S.Ct. 279 (1962), the Supreme Court was presented with the question of whether the City of New York deprived the appellant of due process by failing to give adequate notice of condemnation proceedings affecting property owned on a New York river. The city had instituted proceedings under the provision of the New York City Water Supply Act providing that notice to be given to affected landowners would be by publication in two newspapers published in New York City and in two public newspapers published in each county in which any real estate laid out may be located and to post handbills to be posted in the vicinity of the real estate to be taken. The city caused notice to be published in two New York City newspapers, in two newspapers published in another county and posted notices along a river in the general vicinity of the appellant's premises. Guided by its earlier decision in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the Supreme

Court determined that the newspaper publications and posted notices in the circumstances presented in *Schroeder, supra,* did not measure up to the quality of notice required by the Due Process Clause of the Fourteenth Amendment.

The Court noted that the general rule which had emerged from *Mullane, supra,* was that notice by publication was not enough with respect to a person whose name and address were known or easily ascertained and whose legally protected interests were directly affected by the proceedings in question. In *Schroeder,* no notice was posted anywhere on the appellant's property itself; the two county newspapers in which publication was made were published in small communities miles from the appellant's property; the notices were posted during a month when the appellant's premises were vacant; neither the newspaper publications nor the posted notices contained the name of the appellant *or of any other affected property owner;* and, neither the publications nor posted notices explained what action a property owner might take to recover damages caused by the taking. The Court laid great emphasis on the fact that no sign was posted on the appellant's property or was ever seen by the appellant and concluded the posting of the signs did not constitute the personal notice the rule enunciated in *Mullane, supra,* required.

In the present case, the published notices contained the name of the owner of the property to be condemned and that which defined the coal interest. As noted above, the surface owner was also the grantee in the conveyance

of the property by Cosgrove Coal. We may conclude the publication of the notice was adequate and when such publication was accompanied by the posting of notice, as the record would indicate in the present case, there is no denial of due process.

Recognizing, however, the importance of the plaintiffs' claim that the given notice did not afford the property owner due process of law, we shall not limit our analysis in the present action to the conclusion that the record established proper notice was given according to the statutory requirements.

Further analysis requires that we first determine whether the plaintiffs are entitled to maintain proceedings to recover damages for property taken by the right of eminent domain. Generally, one who acquires title to property *subsequent* to the time of taking is not entitled to bring such an action. As the Pennsylvania Supreme Court stated in *Quade v. Columbia and Port Deposit Railway Co.*, 233 Pa. 20, at 23-4, 81 A. 813 (1911):

> "... damages arising by reason of taking belonged to the owner at the time of appropriation and do not pass to a subsequent vendee, in the absence of anything to show such an intent: Losch's Appeal, 109 Pa. 72. Such damages are a personal claim of the owner of the property at the time the injury occurred and do not run with the land or pass by deed silent as to the damages resulting from such a taking."

In the instant case the deed, dated September 20, 1965, from Kirk Industries to Mike Mazzaro purported to convey title to the mineral interests "(t)ogether with . . . all the estate, right, title, and interest, claim or demand whatsoever . . . to have and to hold the . . . property . . . ." We conclude the language contained in the deed effectively conveyed to Mazzaro whatever claim in the mineral interests was held by Kirk Industries at the time the deed was executed.

We have determined that, as a matter of law, Allegheny County acquired the entire interest in the 104.085 acres in fee simple, including the underlying mineral rights—whether or not the rights were previously severed from the interest in the surface[17], through the 1958 and 1959 resolutions.

The report of viewers indicated the viewers met on May 26, 1961, viewed the property, and conducted a hearing for the purposes of admitting the testimony of the parties interested and their witnesses. The report states:

> "That having viewed said premises as aforesaid and having heard all the testimony as to the value thereof, submitted by the County of Allegheny, as well as that of the claimant, the Viewers do now estimate and determine that the value of said property as condemned at the date of said condemnation was SEVENTY-ONE THOUSAND NINE HUNDRED EIGHTY and no/100ths

[17] Thus, Allegheny County acquired the surface area, the underlying right to support and the interest in the coal and other minerals underneath the surface.

> ($71,980.00) DOLLARS by reason thereof, resulting from the establishment and enlargement of air navigation and terminal facilities . . . ."

As noted above, the $71,980 compensation payment was made to Mazzaro. Section 5623 of the County Code provided[18]:

> "Upon the report of said viewers or any two of them being filed in said court, any party interested may, within thirty days thereafter, file exceptions to the same . . . ."

Exceptions and advertising were waived, however, by Mazzaro and Allegheny County.

Under Section 5627[19] all claims for compensation were deemed paid and satisfied upon payment of compensation for property. It is evident from a reading of the statute that the underlying purpose of the statute is to assure that the condemnor pays 100% of the damages caused by the taking. See *Garella v. Redevelopment Authority*, 413 Pa. 181, 196 A.2d 344 (1964). The taking by eminent domain is a single transaction which forms the basis for an action to recover all of the damages resulting from the taking. For the resulting damages there can be but one assessment. To hold otherwise would create a method of splitting up the damages resulting from a single taking and on ensuing multiplicity of viewers proceedings to assess damages for each interest in the property condemned. This result is contrary to legal policy and cannot be supported by the provisions of the County Code or by

[18] Act of 1953, July 28, P.L. 723, Art. XXVI, §2623, 16 P.S. §5624.
[19] Act of 1953, July 28, P.L. 723, Art. XXVI, §2627, 16 P.S. §5627.

the prior and current statutes governing eminent domain procedure. We find, as a matter of law, that the award made, in the amount of $71,980, was compensation for the damages resulting from the taking of the property—which, by definition, included the mineral rights.

Assuming, *arguendo*, Kirk Industries did not have proper notice of the viewers proceedings, any claim held by Kirk for damages to the mineral rights would not be against the condemnor Allegheny County. Inasmuch as the County made payment of the compensation award, Kirk Industries had a claim against Mazzaro, the recipient of the proceeds, for its share of the award for the value of its mineral interest.

When Kirk Industries transferred its purported interest in coal to Mazzaro together with any claim it had to have and to hold the property, it transferred its claim against Mazzaro for a share of the proceeds. Consequently, the claim was extinguished by merger[20]. Accordingly, defendant Allegheny County's preliminary objections, in the nature of a demurrer, to the petition for an appointment of viewers will be sustained.

The preliminary objections, in the nature of a demurrer, filed on behalf of the defendants in the action for trespass and for an accounting, will be sustained in light of our determination that the resolutions of 1958 and 1959 effected a taking of the coal by the county at that time.

---

[20] In view of the foregoing analysis, we need not discuss the issue of whether or not the statute of limitations had run.

*Appendix—Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, Entered October 30, 1981.*

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania
Civil Division

---

CAROL M. CAPTLINE and EQUIBANK, N.A., as Co-Executors of the Estate of Mike Mazzaro,
*Plaintiffs,*

v.

SOLOMON & TESLOVICH, INC., and RAM CONSTRUCTION CO., INC.,
*Defendants.*

---

No. GD 81-03197
Issue No.
Code 009

---

ORDER

SILVESTRI, *J.*

AND NOW, this 30th day of October, 1981, following a hearing and upon consideration of the briefs submitted by the parties and the stipulations agreed to by the parties, and a review of the record, it is hereby ORDERED that the preliminary objections filed by Solomon and Teslovich, Inc. and Ram Construction Co.,

Inc. to action in trespass and for an accounting are hereby sustained and the complaint filed by the plaintiffs at No. GD 81-03197 is hereby dismissed.

BY THE COURT,
SILVESTRI, *J.*

---

*Eo die*, exceptions noted and bill sealed.

BY THE COURT,
SILVESTRI, *J.* (Seal)

*Appendix—Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, Entered October 30, 1981.*

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania
Civil Division

---

CAROL M. CAPTLINE and EQUIBANK, N.A.,
as Co-Executors of the Estate
of Mike Mazzaro,

*Plaintiffs,*

v.

COUNTY OF ALLEGHENY,

*Defendant.*

---

No. GD 81-02291
Issue No._____
Code_____

---

ORDER

SILVESTRI, *J.*

AND NOW, this 30th day of October, 1981, following a hearing and upon consideration of the briefs submitted by the parties and the stipulations agreed to by the parties, and a review of the record, it is hereby ORDERED that the preliminary objections filed by the

County of Allegheny to the petition for an appointment of viewers are hereby sustained and the petition filed by the plaintiffs at No. GD 81-02291 is hereby dismissed.

BY THE COURT
SILVERTRI, *J.*

*Eo die*, exceptions noted and bill sealed.

BY THE COURT
SILVESTRI, *J.* (Seal)

**Order of the Commonwealth Court of Pennsylvania entered May 20, 1983, denying application for reargument**

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

---

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

v.

COUNTY OF ALLEGHENY,

CAROL M. CAPTLINE, Co-Executor of
the Estate of MIKE MAZZARO, Deceased,
*Appellant.*

---

NO. 2865 C.D. 1981

---

CAROL M. CAPTLINE and EQUIBANK N.A.,
Co-Executors of the Estate of
MIKE MAZZARO, Deceased,

v.

SOLOMON & TESLOVICH, INC. and
RAM CONSTRUCTION CO., INC.,

CAROL M. CAPTLINE, Co-Executor of
the Estate of MIKE MAZZARO, Deceased,
*Appellant.*

---

NO. 5 T.D. 1982

---

*Appendix—Order of the Commonwealth Court of Pennsylvania, entered May 20, 1983, denying application for reargument.*

ORDER

NOW, May 20, 1983, appellants having filed an application for reargument, appellees, pursuant to Pa. R.A.P. 2545, sahll file an answer (original and nine (9) copies) to said application for reargument, which answer shall be filed and served on or before May 31, 1983. Said answer shall be filed in the office of the Chief Clerk *in Harrisburg.*

PAUL S. LEHMAN
Paul S. Lehman, *Senior Judge*

Certified From The Record
May 23 1983
Francis C. Barbush
Chief Clerk